Supreme Court of the United States

OCTOBER TERM, 1927.

Nos. 48 and 49.

In the Matter of OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH and THEODORE W. KNAUTH, individually and as co-partners doing business under the firm name and style of KNAUTH, NACHOD & KUHNE, Bankrupts, ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, SAMUEL POPPER and EMIL HOCHSTEIN, as co-partners doing business under the firm name and style of N. LATZKO and A. POPPER, Petitioners-Respondents, THE EQUITABLE TRUST COMPANY OF NEW YORK, as trustee in bankruptcy, etc., Respondent-Petitioner.	*Petition for Rehearing.*

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Alexander Latzko, William Latzko, Charles Latzko, Samuel Popper and Emil Hochstein, as co-partners doing business under the firm name and style

of N. Latzko and A. Popper, appellants in No. 48 and respondents in No. 49 (hereinafter referred to as petitioners) showeth unto your Honors that each being aggrieved by the decision rendered on the 21st day of November, 1927, by which your petitioners were found to be not entitled to the proceeds of certain two checks, one for $15,000 drawn to the order of Knauth, Nachod & Kuhne, bankrupts, by Goldman Sachs & Company, and another for $1,294.00 drawn to the order of said bankrupts by the National City Bank of New York, both of said checks constituting payments by said banks to the account of your petitioners;

Now, your petitioners respectfully state that the ground of their said grievance are as follows:

1. The court did not decide the only question involved in this appeal, to wit, *the effect of the course of prior dealing* between the petitioners and the bankrupts.

2. That said course of prior dealing *completely negatived* the "inference" that the relationship between bankrupts and petitioners was that of debtors and creditors.

3. That the prior course of dealing herein is more favorable to petitioners than that in the *Johnston* case, 133 U. S., 566, where this court held the relationship was *of agent and principal.*

4. In distinguishing the *Latzko* appeals from the *Rochling* appeal, the court relied on facts rejected by the petitioners and not on the prior course of dealing.

5. The distinction between the *Rochling* appeal and the *Latzko* appeals lies in the different prior course of dealing.

6. In deciding the *Latzko* appeals, the court overlooked the distinction between a mere *bookkeeping* credit and an *actual* credit.

7. The effect of mere bookkeeping credit was not argued by the parties to the Latzko appeals, and the decision of the court thereon is contrary to its decision in the *Johnston* case, *supra*, and other federal cases.

The above points are hereinafter discussed at length.

A. *That in deciding said appeals this court overlooked the main and only question involved therein, to wit, the course of dealing between the petitioners and the bankrupts.*

The petitioners concluded their reply brief by statement of major issues of law involved in these appeals (Reply Brief, pp. 37 and 38):

"1. Whether it is proper to import into the expressions 'account of' and 'favor of', having settled legal and banking unambiguous meaning, a sense contrary to its said settled restrictive effect, particularly where the record contains no facts opposing said restrictive meaning.

2. Is there a relationship of debtor and creditor or principal and agent between a depositor residing in Budapest, Hungary, and having a current checking account with a New York bank, when the depositor was not advised that certain checks were deposited for its benefit with said New York bank; and said depositor had no agreement with said New York bank to treat the deposits of negotiable instruments to his account with said bank as deposits of cash, or as an immediate credit, never in fact treated any negotiable instruments deposited by him or in his behalf with said bank as cash, or as an immediate credit; never drew upon his said bank before the collection by said bank of negotiable instruments so deposited to his ac-

count, as aforesaid; at the time of the deposit of the negotiable instruments involved herein, he was not indebted to said New York bank but had a credit balance; and in this particular instance, did not desire an immediate credit and did not draw before the collection of the check herein involved by said bank immediately upon the deposit thereof."

The first of the above issues was that based upon the doctrine of *White* v. *Miners National Bank*, 102 U. S., 658. The second of the above issues was that based upon the decision of this court in *St. Louis & San Francisco Ry. Co.* v. *Johnston*, 133 U. S., 566.

The decision of this court in *Equitable Trust Co.* v. *Rochling*, rejected the applicability of the *White* case to the facts in the *Rochling* case and in these appeals. Hence, it became incumbent upon the court to consider the second major proposition presented by the Latzko appeals.

This court, in the *Equitable Trust Co.* v. *Rochling*, decided that in ascertaining the existence or non-existence of any express or implied agreements between the depositary and the bank, the prior course of dealing between them should be taken into account. The court there said:

"Ordinarily, where paper is indorsed without restriction by a depositor and is at once placed to his credit by the bank, *the inference* is that the bank has become the purchaser of the paper, and in making the collection is not acting as the agent of the depositor. (*Douglas* v. *Federal Reserve Bank, supra; Burton* v. *United States, supra; In re Jarmulowsky*, 249 Fed., 319, 321). * * *."

"Nothing in the previous course of dealing or in the actions of respondents indicates that they intended or had any reason for intending that Knauth, Nachod & Kuhne should take the paper as their agents for collection, or that any restriction should be placed

on the use of the checks by Knauth, Nachod & Kuhne once they had credited respondents."

The petitioners therefore conclude that this court has approved the interpretation of the decision in this court in *Burton* v. *United States*, advocated by the petitioners. Furthermore, this court in *Equitable Trust Co.* v. *Rochling* referred with approval to the decision of this court in *St. Louis & San Francisco Co.* v. *Johnston*, 133 U. S., 586. Despite the victory for the petitioners insofar as the law is concerned, the court entirely overlooked facts showing the course of dealing between the petitioners and the bankrupts herein, and, hence, arrived at a conclusion diametrically opposite to that warranted by the facts showing the prior course of dealing between them and the bankrupts.

B. *The "inference" that the relationship between bankrupts and the petitioners was that of debtor and creditor is completely negatived by the undisputed course of dealing between them.*

The effect of the uncontradicted prior course of dealing between the parties hereto was thoroughly discussed by the claimants both in their main and in their reply briefs. The main brief, Points Five and Six, and the Reply Brief, Point Two, deal conclusively and extensively with the course of dealing itself, and its effect upon the issues of these appeals. It was there shown that respondent conceded in these appeals that the appellants never treated any of their deposits as cash nor as an immediate credit, and never drew against their deposits before collection thereof by the bankrupts; that they did not so treat or draw against their deposit of checks in the particular instance involved herein; that the petitioners were not indebted to the bankrupts at any time, were not advised by the bankrupts of the crediting of said checks to their ac-

counts, and had no agreement with the bankrupts to treat their deposits as cash or as an immediate credit.

By stipulation of the parties, the petition of the claimants and the answer of the receiver were made the pleadings herein (R., 21). Therefore, by virtue of General Equity Rule No. 30, the following averments in the petition are deemed confessed by the Receiver:

> "That petitioners had no agreement with said K. N. & K. to treat evidences of debt deposited with said K. N. & K. for collection or otherwise as a deposit of cash, nor that any immediate credit should be given by said K. N. & K. to petitioners upon the receipt of such evidences of debt" (R., 6).
>
> "That petitioners did not treat evidences of debt deposited with said K. N. & K. for collection and otherwise, as a deposit of cash, nor as an immediate credit open to petitioners by said K. N. & K. upon the receipt of any evidences of debt, nor did petitioners draw upon said K. N. & K. against the deposit or deposits of such evidences of debt before the collection of moneys due upon said evidences of debt by said K. N. & K." (R., 6, 7).
>
> "That your petitioners did not draw upon said K. N. & K. against said account as aforesaid, before the collection by said K. N. & K. of the moneys due upon such evidences of debt as were deposited by the petitioners herein to their account with said K. N. & K." (R., 22).
>
> "That at the time petitioners herein caused said checks hereinbefore described to be delivered to said K. N. & K. petitioners had a credit balance with said K. N. & K. amounting to several thousand dollars and were not then and have not been at any time since then, and are not now, indebted to said K. N. & K. or to said Receiver" (R., 9).

The conceded facts as to the prior dealing between the bankrupts and the petitioners required the court's decision whether or not the same did or did not negative the inference that the relationship of debtor and creditor was established between them each time the petitioners made a deposit of negotiable instruments to their account with the bankrupts. This is the only question which the court had to decide in this case, after it rejected the applicability of its decision in the *White* case to the facts at bar. In overlooking this sole point, the court entirely failed to decide the appeal and the only question of law involved therein.

C. *The facts at bar are undistinguishable from St. Louis & San Francisco Ry. Co.* v. *Johnston, 133 U. S., 566, approved by this court in Equitable Trust Co.* v. *Rochling.*

In *Equitable Trust Co.* v. *Rochling Bros.,* this court said:

> "The proceeds of the two checks concededly have come into the hands of the petitioner, the bankrupts' trustee, and the sole question presented is whether the bankrupts on receipt of the check and before the filing of the petition in bankruptcy became the owners of them, or whether, as the Court of Appeals held, Knauth, Nachod & Kuhne were respondents' agent to collect them. If the former, respondents were creditors of the bankrupts (*Douglas* v. *Federal Reserve Bank,* 271 U. S., 489; *Burton* v. *United States,* 196 U. S., 283), entitled to share only on an equal footing with other creditors. If the latter, respondents were entitled to reclamation from the petitioners, since the checks had not been collected at the time of the petition in bankruptcy (*St. Louis & San Francisco Ry.* v. *Johnston,* 133 U. S., 566; *White* v. *Stump,* 266 U. S., 310, 313; Bankruptcy Act, sec. 10 [a], chap. 641, 30 Stat. 565 as amended; section 16, chap. 487, 32 Stat., 800)."

What facts showing the prior course of dealing do or do not negative the "inference" that the relationship of debtor and creditor arises between depositor and his bank upon a deposit of negotiable instruments to the depositors account with such bank were considered by this court in *St. Louis & San Francisco Ry. Co.* v. *Johnston*, and it was there decided that the prior course of dealing as established by the facts there proven destroyed any "inference" that the relationship of debtor and creditor there existed between the bank and its depositor.

The facts at bar showing the prior course of dealing between the claimants and the bankrupts are identical with those in the *Johnston* case. It is hardly possible to find a case more similar on the facts, than the Latzko appeals and the *Johnston* appeal. This aspect of this petition is discussed at greater length at Point I of the argument hereto annexed. The decision of this court in this case constitutes a complete overruling of its decision in the *Johnston* case without any discussion of the *Johnston* case and without consideration of the facts surrounding the deposit and showing the prior course of dealing between the petitioners and the bankrupts, although the matter was properly brought to the attention of the court both in the briefs filed by the petitioners and during the oral argument in their behalf, and although the *Johnston* case was approved by this court in the Rochling decision handed down at the same time as its decision in this case.

D. *The court in its opinion erroneously omitted to consider the course of dealing as a distinguishing feature of these appeals from the Rochling appeal, but relied on facts rejected by the petitioners as constituting such difference.*

In the Latzko appeals this court said:

> "Two circumstances *are said by claimants* to distinguish this case from No. 34, *Equitable Trust Com-*

> *pany* v. *Rochling, et al.*, just decided. The first is the fact that the check involved in the claimants' petition was not a cashier's check, but the check of a bank drawn upon its own bank of deposit. * * * It is suggested also that although it was the practice of the bankrupts to credit checks to claimants as soon as deposited, it does not affirmatively appear that claimants asked or expected them to be credited in advance of collection or that the items were listed as immediately entitled to interest."

The first of said circumstances said to be claimed by claimants (petitioners here) was expressly repudiated by them (Reply Brief, p. as a controlling fact.

As to the second circumstance mentioned by the court the record at bar in these appeals contained nothing whatsoever showing or suggesting that "it was the practice of the bankrupts to credit checks to claimants as soon as deposited." The only evidence on the point is that at Record, 25, where it is said:

> "It is further stipulated by and between the parties hereto that Latzko & Popper, the petitioner herein, were credited, on the books of K. N. & K., as of June 15, 1923, with the two checks deposited for their account in the respective amounts of $15,000 and $1,294."

In other words, there is only evidence of a *mere bookkeeping credit*, given *in this particular instance* to the petitioners by the bankrupts. This court held in the *Johnston* case, *supra*, that such bookkeeping credit does not divest the depositor of title to the negotiable paper deposited by him to his account with his bank. On the other hand, in pointing out the material differences in fact between the Rochling and the Latzko appeals we stated on page 8 of our main brief:

> "(d) It does not appear in the Rochling case that Rochling Brothers did not treat their deposits as a deposit of cash or as an immediate credit to them; nor did it appear that Rochling Brothers never drew upon the bankrupts against their deposits before the collection by the bankrupts of negotiable instruments deposited with them by Rochling Brothers."

We assigned as the error of the Circuit Court of Appeals inter alia, the following:

> "2. The Circuit Court of Appeals erred in disregarding the admitted course of dealing between the petitioners and the bankrupts."

It therefore follows that these appeals were decided by the court on distinctions not relied upon by petitioners and the real distinguishing facts relied upon by the petitioners were overlooked by the court and not considered by it.

E. *The effect of a mere bookkeeping credit by the bank as distinguished from an actual credit was not argued by the parties to this appeal.*

The decision at bar was made on the ground that although the established and undisputed course of dealing between the parties hereto showed that neither the petitioner nor the bankrupts treated the deposits of negotiable paper by the petitioners to their account with the bankrupts as a deposit of cash or as an immediate credit opened to the petitioners, mere bookkeeping credit of the amounts of the checks deposited under this course of dealing, transferred the title to the proceeds thereof to the bank. This holding is directly contrary to the holding of this court in the *Johnston* case, supra, where the bank not only gave credit to the depositor on its books, but entered the credit in the depositors pass book. In the case at bar, the depositors had no knowledge whatsoever of the bookkeeping

operations of the bankrupts. The *Johnston* case has never been doubted to be good law on the point that *mere book-keeping credit* as distinguished from the *actual* credit does not transfer title to the check. It is supported by prior and subsequent authorities to the same effect, all which the decision of this court squarely overrules without discussion or consideration. The point was not discussed either in the briefs of the petitioners or in that of the respondent because it seemed to be well established and beyond any question. The matter is discussed at a greater length in Point II of the argument hereto annexed.

Your petitioners in asking for rehearing do not dispute a single conclusion of law arrived at by this court in the *Equitable Trust Co.* v. *Rochling*, but your petitioners contend that apparently owing to the fact that both cases were decided simultaneously, the material distinction in the course of dealing shown by the appeals of your petitioners and the Rochling appeal was overlooked and the main and only issue, to wit, whether the facts at bar showing the prior course of dealing between the petitioners and the bankrupts completely negatived the inference that the relationship of creditor and debtor arose between them upon the deposit of checks in question, was not decided by this court.

WHEREFORE your petitioners humbly pray that Your Honors will grant a rehearing, respectfully submitting to such orders as the court may make in the matter.

Dated, New York, the 26th day of December, 1927.

ALEXANDER LATZKO,
WILLIAM LATZKO,
CHARLES LATZKO,
SAMUEL POPPER,
EMIL HOCHSTEIN,

By BRODEK & RAPHAEL,
Attorneys-in-Fact.

Certificate of Counsel.

I, Borris M. Komar, an attorney and counselor-at-law of the several courts of record in the State of New York and of the above court, do hereby certify that as one of the counsel for the petitioners named in the foregoing petition, I have examined the proceedings against them, and the opinion of the above court rendered on the 21st day of November, 1927, and carefully inquired into the matters set forth in their foregoing petition, and I believe the same are true and that the foregoing petition is presented in good faith and not for delay.

Dated, New York, the 15th day of December, 1927.

BORRIS M. KOMAR,
Counsel for Petitioners.

ARGUMENT.

POINT I.

The facts in the case at bar are undistinguishable from those in St. Louis & San Francisco Ry. Co. v. Johnston.

The uncontradicted course of dealing between the parties hereto completely negatived the inference that the relationship of debtor and creditor was contemplated to arise between them before actual collection of negotiable instruments deposited by petitioners to their account with the bankrupts.

In *St. Louis & San Francisco Ry. Co.* v. *Johnston*, 133 U. S., 566, this court considered a course of dealing identical with that in the case at bar, and it decided that the relationship existing on those facts between the depositor and the bank was that of principal and agent and not creditor and debtor.

The *Johnston* case, just as the present case, arose upon appeal from the United States Circuit Court for the Southern District of New York. The reported statement of facts contained in the opinion of Wallace, C. J., in the *Johnston* case, is as follows (27 Fed., 243, 244):

> "Wallace, J.: The proofs show that for several years prior to the fifth day of May, 1884, the plaintiff kept an account with the Marine National Bank of the City of New York, making deposits with and drawing checks upon the bank from time to time. On the fifth day of May, 1884, the plaintiff deposited with the bank a sight draft * * *. On several occasions during the time the plaintiff kept an account with the

bank the plaintiff deposited similar paper at the same time with money and the bank credited the plaintiff upon its books and also upon the pass book of the plaintiff with the amount of such paper as a cash item. * * * *The plaintiff has never drawn against the credits given for sight drafts, but never had occasion to do so. There was no express arrangement or understanding between the plaintiff and the bank that such deposits should be treated as cash.* When the draft in suit was deposited it was sent to the bank by a messenger boy, but the plaintiff's pass book was not sent, having previously been left with the bank for the purpose of being written up. *The amount of the draft was credited by the bank on its own books to the plaintiff as a cash item,* but it was not entered in the pass book of the plaintiff until after the failure of the bank, and then without the plaintiff's knowledge."

We have taken the statement of facts by the court below because it is fuller than the statement of facts made in the opinion of this court, and because it was more favorable to the bank in whose favor the decision was made by Wallace, C. J., but which decision was reversed on appeal to this court.

If we substitute the dates and the names of the parties involved in this case, we will get almost a complete statement of facts at bar:

> The proofs show that for several years prior to the fifteenth day of June, 1923, the plaintiffs kept an account with Knauth, Nachod & Kuhne of the City of New York, making deposits with and drawing checks upon the bank from time to time. On the 15th day of June, 1923, the plaintiffs deposited with the bank two checks * * *. On several occasions during the time the plaintiffs kept an account with the bank, the plaintiffs deposited similar paper and the bank credited the

plaintiff upon its books, with the amount of such paper as a cash item. * * * *The plaintiffs have never drawn against the credits given for checks, but never had occasion to do so. There was no express arrangement or understanding between the plaintiffs and the bank that such deposits should be treated as cash.* The amount of the checks was credited by the bank on its own books to the plaintiff as a cash item (R., 6, 7, 9 and 22).

The facts at bar are stronger than those in the *Johnston* case, inasmuch as no deposit book was issued by the bankrupts to the petitioners; no notice was given to the petitioners of the credit in the books of the bankrupts nor an entry was made to that effect in any pass-book; no interest was allowed by the bankrupts on the credit balances of the petitioners; and the petitioners did not even have knowledge or information that the deposits desired by them were actually made by the New York banks; nor was there any evidence to show that the bankrupts ever allowed overdrafts to the petitioners, nor did they ever deposit cash.

This court in the *Johnston* case said at pages 573 and 574:

> "*This was not consistent with the theory of an understanding between the bank and the Company that the title to this and similar drafts should pass absolutely to the bank.* If the draft had not been paid, the bank could have canceled the credit, as it clearly accepted no risk on the paper. *The draft was entered at its full value, which indicated that it was not discounted, but credited for convenience and in anticipation of its payment. * * * If, under the circumstances disclosed in this case, the only balance the San Francisco Company had was made up of the deposit of this draft, and it had drawn against it, and the bank had declined to honor the check, could the San Francisco Company have sustained an action on the ground of a*

general commercial usage, when by the course of dealing for five years it had never drawn against paper so deposited? Because banks often let good customers overdraw, do the latter thereby get the right to do so when the bank deems it improper to permit it? Undoubtedly if the San Francisco Company had overdrawn, and this draft had been credited to cover the over-draft, or if the Company had drawn against the draft, the bank could hold the paper until the account was squared. And if the bank had transferred the draft to one occupying the position of a bona fide holder, such transfer would have conferred title on its transferee by reason of its reputed ownership so far as the latter was concerned. *Metropolitan National Bank* v. *Loyd*, 90 N. Y., 530."

At page 575, this court, relying upon New York and English cases, said:

"And in *Scott* v. *Ocean Bank*, 23 N. Y., 289, it was held that '*the property in notes or bills* transmitted to a banker by his customer to be credited the latter, *vests in the banker only when he has become absolutely responsible for the amount to the depositor*,' and that '*such an obligation*, previous to the collection of the bill, *can only be* established by a contract to be expressly proved or *inferred from an unequivocal course of dealing.*"

"'Every man who pays bills not then due into the hands of his banker,' said *Lord Ellenborough* in *Giles* v. *Perkins*, 9 East, 11, 14, 'places them there as in the hands of his agent to obtain payment of them when due. If the banker discount the bill or advance money upon the credit of it, that alters the case, he then acquires the entire property in it, or has a lien on it *pro tanto* for his advance.'"

> *"If there be no bargain that the property should be changed, the relation resembles that of principal and agent. Mere liberty to draw does not make out such a bargain, particularly where interest is allowed by the banker upon the bills only from the time when their amount is received. Ex parte Barkworth,* 2 De. G. & J., 194; *Thompson* v. *Giles,* 2 Barn & C., 422; *Ex parte Sargeant,* 1. Rose, 153."

There was no such bargain made in the Latzko case, nor any interest allowed on petitioners' balances.

The checks at bar were not discounted, were not used to square an overdrawn balance against the petitioners with the bankrupts, and were not drawn upon by the petitioners. The rule for ascertaining the effect of a prior course of dealing upon the title to a deposit of negotiable instruments by the depositor to his account with the bank was correctly stated by Wallace, C. J., in the court below (27 Fed., 243, 245):

> "When it appears that it has been the uniform practice between the parties in their past dealings to treat deposits of paper as cash, their intention to do so in the particular transaction should be inferred, in the absence of new and inconsistent circumstances."

In the *Johnston* case, the uniform practice of the parties in their past dealings was *not* to treat the deposits of paper as cash or as an immediate credit. For that reason this court reversed the decision of the Circuit Court for the Southern District of New York in that case. The same state of facts exists in the appeals at bar and constitutes the distinguishing feature of the *Johnson* and *Latzko* cases from those of *Burton* v. *United States,* 196 U. S., 283, *Douglas* v. *Federal Reserve Bank,* 270 U. S., 489, and *Equitable Trust Co.* v. *Rochling Bros.,* where no such prior course of dealing was established by the evidence.

POINT II.

Mere bookeeping credit does not transfer title to the check. Under the course of dealing herein, the crediting of the checks herein was a mere bookkeeping entry.

Despite the uncontradicted prior course of dealing between the petitioners and the bankrupts showing that neither the bankrupts nor the petitioners treated the petitioners' deposits of negotiable instruments as cash, before the collection thereof, this court stated that the dominant fact constituting the objective of the petitioners was the arrangement of the credit with the bankrupts and that result was achieved when a bookkeeping credit was given by the bankrupts to the petitioners.

Assuming that the establishment of an *actual* credit with his bank is an objective of any depositor, and, therefore, was that of the petitioners herein, no *actual* credit is established by mere bookkeeping entry which is not communicated by the bank to the depositor, is not entered in the depositor's pass-book and against which (as the established course of prior dealing shows) the depositor did not intend to draw, and the bankrupts did not expect them to draw.

When this court on a prior occasion had to pass upon a similar point upon almost similar facts, it said in *St. Louis & San Francisco Ry. Co.* v. *Johnston*, 133 U. S., 566, on pages 575 and 576:

> "The question was one of fact rather than of law, and we think *there should be something more in the evidence* tending to establish that the San Francisco Company understood that the bank had become owner of the paper, *than these mere credits for convenience*, before that can be held to be the fact, notwithstanding

it may be a recognized usage to allow a customer to draw. *So far from there being shown an unequivocal course of dealing tending to support that conclusion, it seems to us the tendency of the evidence is otherwise.*"

The decision of this court in the *Johnston* case holding that bookkeeping credits "for convenience" of the bankers do not constitute transfer of title to negotiable instruments does not stand alone, but is supported by other cases.

In *First National Bank* v. *Armstrong*, 42 Fed., 193, the court after referring to *Fifth National Bank* v. *Armstrong*, 40 Fed., 46, said at page 196:

> "In that case the credit was, as in this case, conditional, and not as it was in *First National Bank of Elkhart* v. *Armstrong*, 39 Fed., 231, unconditional; *and there was wanting the agreement which was found to exist in the Elkhart Bank case that the credit should be as cash, and that the Elkhart Bank should have the right to draw upon the same as cash.*"

In *Armstrong* v. *Second National Bank*, 38 Fed., 833, the court said at page :

> "In the absence of a distinct understanding on this point, the charge against the Fidelity bank *and credit to itself by the defendant of the amount of the check cashed would be provisional merely, and subject to be corrected if the check was dishonored.*"

In *Levi* v. *National Bank*, 5 Dillon, 104, the court said at page 111:

> "*It is not unusual for bankers to credit* their correspondents or customers with the amount of paper of

a certain character at the time of its receipt for collection, *but such credits are provisional only*, being made in anticipation that the paper will be promptly paid, with the right to cancel the credit if the paper is dishonored (*Trinidad National Bank* v. *Denver National Bank*, 4 Dill., 290). Such was the nature of the credit made in this instance, *and the circumstances is immaterial, as it does not vary the ultimate rights of the parties.*"

In *Manufacturers' National Bank* v. *Continental Bank*, 148 Mass., 553, 558, the court said:

"Under this arrangement *the credit given for a check was merely provisional* until the check was paid. *It did not create a debt from the Fidelity National Bank to the plaintiff, and it did not change the ownership of the check. Levi* v. *National Bank*, 5 Dillon, 104. *Balbach* v. *Frelinghuysen*, 15 Fed., 675. In that respect their relations to each other were very different from those between a banker and a depositor, *where checks are received on deposit as cash, and an absolute right to draw against them is given.*"

The banks are daily transacting an enormous amount of business, and have to use settled and well understood methods of bookkeeping and internal management which would prevent confusion and aid them in orderly transaction of their affairs. When the bank receives deposits it has to enter them somewhere in order to keep trace of the operations of each of its customers. It is the universal custom of all banks to enter all deposits of the customer in his account as and when the same are made, because otherwise, it cannot keep track of them. No bank keeps two books of account for each customer. Every bank has only one ledger. Whether the bank takes or does not take title to the negotiable instruments deposited with it by the

customer, depends on either an express arrangement or that implied from the course of dealing between the bank and the customer. It is indispensable for the bank as a matter of bookkeeping necessity to enter the deposits of the depositor as a credit in his account, immediately the deposit is made, but such action on the part of the bank does not amount to an *actual* credit opened by the bank to the customer. As this court said in *Commercial National Bank* v. *Armstrong*, 148 U. S., 57, at page 58:

> "No mere bookkeeping between the Fidelity and its sub-agent could change the actual status of the parties or destroy rights which arose out of the *real facts* of the transaction."

In the *Equitable Trust Co.* v. *Rochling*, this court refused to assign to the expressions "for account of" the meaning which the court deemed would be contrary to the course of business and banking usage in general. It there said:

> "But it was indispensable to the completion of the transactions that the bankrupts should be advised to what account the checks were to be credited. And it was apparently the function of the words in question to tell them.
>
> That alone, we think, was their purpose. To assign them any other would be to ignore the course of business followed here and banking usage in general, and to give them a strained and unnatural construction."

We respectfully submit that the settled course of dealing here entirely eliminates the possibility that the bookkeeping entry herein amounted to the actual credit. And in view of a business necessity for the banks to credit all items that are deposited by their customers in the accounts of the customers and the settled banking usage sanctioned by numerous decisions, distinguishing bookkeeping credit

from the actual credit, there is no warranty under the uncontradicted course of dealing between the petitioners and bankrupts herein, to elevate a mere bookkeeping practice into the transfer of title not desired and not intended by the parties to the transaction.

That the petition for rehearing be granted.

Dated, New York, 15th day of December, 1927.

Respectfully submitted,

CHARLES A. BRODEK,
BORRIS M. KOMAR,
Counsel for Alexander Latzko, et al., Petitioners in No. 48 and Respondents in No. 49.

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Supreme Court of the United States,

OCTOBER TERM, 1925.

IN THE MATTER

of

OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH AND THEODORE W. KNAUTH, INDIVIDUALLY AND AS CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF KNAUTH, NACHOD & KUHNE,

Bankrupts,

ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, SAMUEL POPPER AND EMIL HOCHSTEIN, AS CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF N. LATZKO AND A. POPPER,

Petitioners,

MIDDLETON S. BORLAND,

Respondent.

CROSS PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

GODFREY GOLDMARK,
Counsel for Respondent and Cross Petitioner,
74 Broadway,
New York City.

The Bunting Print Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1925.

IN THE MATTER

OF

OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH and THEODORE W. KNAUTH, individually and as co-partners doing business under the firm name and style of KNAUTH, NACHOD & KUHNE,
Bankrupts,

ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, SAMUEL POPPER and EMIL HOCHSTEIN, as co-partners doing business under the firm name and style of N. LATZKO and A. POPPER,
Petitioners,

MIDDLETON S. BORLAND,
Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, The Equitable Trust Company of New York, as Trustee in Bankruptcy of Knauth, Nachod Kuhne, respectfully shows:

1. The above named Middleton S. Borland departed this life on March 23, 1926. At a meeting of creditors of Knauth, Nachod & Kuhne, duly held on April 9, 1926, your petitioner was duly elected Trustee in Bankruptcy of said bankrupts and has duly qualified as such.

2. Your petitioner respectfully shows that the questions of law presented upon the present application are the same as those in the application for a writ of *certiorari* made by your petitioner's predecessor in case No. 1069 entitled Middleton S. Borland as Trustee in Bankruptcy of Knauth, Nachod & Kuhne, petitioner, against Carl Rochling *et al.*, trading as Gebr. Rochling, respondents, which application is pending before this Court.

3. The reclamation petition in the present case involved three checks alleged to have been collected after the bankruptcy herein. As to one of them, the check for $3,000.00, the Master found and the Circuit Court of Appeals sustained the finding that collection of this check had been effected prior to the bankruptcy. This conclusion is not sought to be reviewed by either party to the proceeding. As to the two other checks which were collected after the bankruptcy proceedings the Circuit Court of Appeals affirmed the courts below and denied the reclamation petition with respect to the proceeds of the check for $15,000.00, and, reversing the courts below, allowed the reclamation petition for the proceeds of the check for $1,294.00.

4. The distinction laid down by the Circuit Court of Appeals between the transaction involving the $15,000.00 check and that involving the $1,294.00 check presents the same questions of law as are raised in the application for a writ of *certiorari* in case No. 1069 above referred to.

5. Latzko *et al.* have filed a petition in the present case to review the decision of the Circuit Court of Appeals dis-

allowing the reclamation claim for the proceeds of the said check for $15,000.00 and your petitioner, the Trustee in Bankruptcy, files this cross-petition praying for a writ of *certiorari* to review the decision of the Circuit Court of Appeals in so far as it allows the reclamation petition with respect to the proceeds of the check for $1,294.00, to the end that the decision of the Circuit Court of Appeals may be reviewed in all its aspects.

WHEREFORE, your petitioner respectfully prays that a writ of *certiorari* may be issued herein to review so much of the decision of the Circuit Court of Appeals for the Second Circuit as reverses the order of the United States District Court for the Southern District of New York denying the reclamation petition herein, and that your petitioner may have such other and further relief in the premises as to this Court may seem appropriate.

THE EQUITABLE TRUST COMPANY OF NEW YORK
As Trustee in Bankruptcy of
Knauth, Nachod & Kuhne
by GODFREY GOLDMARK,
Counsel.

UNITED STATES OF AMERICA,
District of Columbia, } ss.:

GODFREY GOLDMARK, being duly sworn, deposes and says: I am counsel for The Equitable Trust Company of New York, Trustee in Bankruptcy of Knauth, Nachod & Kuhne, the aforesaid petitioner. I have read the foregoing cross-petition and the same is true.

GODFREY GOLDMARK

Sworn to before me this 17
day of April, 1926.

Anna DeGalia

Notary Public

My commission expires Dec. 13, 1926.

Certificate of Counsel.

I hereby certify that I have examined the foregoing cross-petition and in my opinion it is well founded and the case is one in which the prayer of the petitioner should be granted by this Court.

GODFREY GOLDMARK,
Counsel for Petitioner.